

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 12, 2007 Session

**STATE OF TENNESSEE, DEPARTMENT OF CHILDREN'S SERVICES v.
L. H.**

**Appeal from the Juvenile Court for Robertson County
No. D-25310 Melanie E. Stark, Special Judge**

No. M2007-00170-COA-R3-PT - Filed on August 31, 2007

The trial court terminated the mother's parental rights upon findings that she abandoned the child by willfully failing to visit and support the child, and that termination was in the child's best interest. The mother appeals contending the Department of Children's Services failed to make reasonable efforts to reunite the family. We have concluded that the mother failed to provide contact information to the Department, and she abandoned her child by willfully failing to visit or support the child, each of which relieved the Department of the affirmative duty to make reasonable efforts at reunification. We have also determined that termination of the mother's parental rights was in the child's best interest. Accordingly, we affirm the termination of her parental rights.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and PATRICIA J. COTTRELL, J., joined.

Jonathan A. Garner, Springfield, Tennessee, for the appellant, L. H.

Robert E. Cooper, Jr., Attorney General and Reporter, and James D. Foster, Assistant Attorney General, for the appellee, State of Tennessee, Department of Children's Services.

OPINION

This matter first came to the attention of the authorities as a result of a tragic event that occurred on March 9, 2004, when the parents of the child who is the subject of these proceedings became involved in the last of what had been a series of domestic disputes during their tumultuous relationship. As the parents' dispute escalated at their apartment on March 9, the father threw boiling water and grease at the mother while she was holding the couple's eight-month-old child. The boiling water and grease caused second and third degree burns to the mother and infant child. As a consequence of the serious injuries, both the child and mother were transported to Vanderbilt

University Medical Center for emergency medical attention where they remained hospitalized for several days. Father, on the other hand, was taken to jail where he remains to this day.¹

With the mother incapacitated and the father incarcerated, leaving no one to care for the child, the Department of Children's Services (Department) filed a petition for Temporary Custody of the child on March 12, 2004. Counsel was appointed to represent the mother and the father. A guardian ad litem was appointed to represent the best interests of the child. Shortly thereafter, with the consent of all participants, the mother regained temporary custody of the child. On September 7, 2004, however, the guardian ad litem requested that custody of the child be returned to the Department due to concerns the mother could not care for the child. During a review hearing three weeks later, the court found the child to be dependent and neglected. Significantly, the mother, who was ably represented by counsel at the time, agreed the child was dependent and neglected and consented to returning custody of the child to the Department. Pursuant to the order, the infant child was taken into the Department's custody and remains there today.

Two weeks after the second removal of the child from the mother, the Department drafted a permanency plan, the goal of which was reunification of the child with the mother. Pursuant to the plan, the mother was required, *inter alia*, to (1) remain in contact with [the Department]² and provide accurate contact information; (2) undergo a complete psychological exam; and (3) receive therapeutic visitation services. The mother, however, failed to satisfy any of the significant components of the plan. She failed to maintain communication with the Department; she failed to provide contact information although she moved eight times after her child was taken into custody; and she failed to visit or support the child at any time between April of 2005 and June of 2006.

As a consequence of the mother's many failures, the Department revised the goal of the initial permanency plan on October 26, 2005, changing it from reunification to adoption. Then on March 17, 2006, the Department filed a Petition to Terminate Parental Rights of both parents. A full evidentiary hearing was conducted on October 12, 2006, which was attended by the mother and her attorney, the guardian ad litem, the father and his attorney, and counsel for the Department. At the conclusion of the hearing, the court announced that it wanted another evaluation of the mother before making a final decision. Following a series of motions and after receiving the results of the additional assessment of the mother, which was obtained on November 14, 2006, the trial court entered an order on December 6, 2006, terminating the mother's parental rights based on the grounds of abandonment, substantial non-compliance with the permanency plan and persistent unremedied conditions, and a finding that termination was in the child's best interest.³

¹Father is serving a twenty-five year sentence for aggravated child abuse and aggravated assault.

²The State of Tennessee contracted with Residential Services Incorporated (RSI) to provide the requisite services to Mother.

³The parental rights of the father, who participated with the assistance of counsel at the final hearing, were also terminated. He does not appeal the termination of his parental rights.

In this appeal, the mother contends the Department failed to make reasonable efforts at reunification.⁴ The Department counters contending it was under no duty to make reasonable efforts because the court terminated the mother's rights on the ground of abandonment.⁵

STANDARD OF REVIEW

Parents have a fundamental right to the care, custody and control of their children. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Hawk v. Hawk*, 855 S.W.2d 573, 577 (Tenn. 1993). This right is superior to the claims of other persons and the government, yet it is not absolute. *In re S.L.A.*, 223 S.W.3d 295, 299 (Tenn. Ct. App. 2006).

The party seeking to terminate parental rights must prove two elements. That party, the petitioner, has the burden of proving that there exists a statutory ground for termination. Tenn. Code Ann. § 36-1-113(c)(1) (2005); *Jones v. Garrett*, 92 S.W.3d 835, 838 (Tenn. 2002). Furthermore, the petitioner must prove that termination of parental rights is in the child's best interest. Tenn. Code Ann. § 36-1-113(c)(2) (2005); *In re F.R.R., III*, 193 S.W.3d 528, 530 (Tenn. 2006). See *In re A.W.*, 114 S.W.3d 541, 544 (Tenn. Ct. App. 2003); *In re C.W.W.*, 37 S.W.3d 467, 475-76 (Tenn. Ct. App. 2000) (holding a court may terminate a parent's parental rights if it finds by clear and convincing evidence that one of the statutory grounds for termination of parental rights has been established and that the termination of such rights is in the best interests of the child).

The elements stated above must be established by clear and convincing evidence. See Tenn. Code Ann. § 36-1-113(c)(1); *In re Valentine*, 79 S.W.3d 539, 546 (Tenn. 2002). The clear and convincing evidence standard is a heightened burden of proof which serves to minimize the risk of erroneous decisions. *In re C.W.W.*, 37 S.W.3d at 474; *Matter of M.W.A., Jr.*, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). Evidence satisfying this high standard produces a firm belief or conviction regarding the truth of facts sought to be established. *In re C.W.W.*, 37 S.W.3d at 474. The clear and convincing evidence standard defies precise definition. *Majors v. Smith*, 776 S.W.2d 538, 540 (Tenn. Ct. App. 1989). It is more exacting than the preponderance of the evidence standard, *Santosky v. Kramer*, 455 U.S. 745, 766 (1982); *Rentenbach Eng'g Co. v. General Realty Ltd.*, 707 S.W.2d 524, 527 (Tenn. Ct. App. 1985), yet it does not require such certainty as the beyond a reasonable doubt standard. *Brandon v. Wright*, 838 S.W.2d 532, 536 (Tenn. Ct. App. 1992); *State v. Groves*, 735 S.W.2d 843, 846 (Tenn. Crim. App. 1987). Clear and convincing evidence eliminates any serious or substantial doubt concerning the correctness of the conclusions to be drawn from the evidence, see *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n. 3 (Tenn. 1992), and it should produce a firm belief or conviction with regard to the truth of the allegations sought to be established. *In re Estate of Armstrong*, 859 S.W.2d 323, 328 (Tenn. Ct. App. 1993); *Brandon*, 838 S.W.2d at 536; *Wiltcher v. Bradley*, 708 S.W.2d 407, 411 (Tenn. Ct. App. 1985).

⁴She presents other issues on appeal but they are mooted by our rulings as to reasonable efforts, abandonment, and the child's best interests.

⁵In the alternative, the Department contends it exerted reasonable efforts to reunite the family. This issue is also mooted by our rulings as to abandonment and the child's best interests.

On appeal, the trial court's findings of fact are reviewed *de novo* upon the record accompanied by a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d); *In re F.R.R.*, 193 S.W.3d at 530. In weighing the preponderance of the evidence, great weight is afforded to the trial court's determinations of witness credibility, which shall not be reversed absent clear and convincing evidence to the contrary. *See Jones*, 92 S.W.3d at 838.

Questions of law, however, are reviewed *de novo* with no presumption of correctness. *Langschmidt v. Langschmidt*, 81 S.W.3d 741, 744-45 (Tenn. 2002). A trial court's ruling that the facts of the case support a ground of termination, such as the ground of willful abandonment, are examined as questions of law, which are reviewed *de novo* with no presumption of correctness. *In re Adoption of A.M.H.*, 215 S.W.3d 793, 810 (Tenn. 2007); *Cf. In re Valentine*, 79 S.W.3d at 548 (concluding that substantial noncompliance is a question of law which we review *de novo* with no presumption of correctness).

ANALYSIS

Parental rights are among the oldest of the judicially recognized liberty interests protected by the Due Process Clauses of the federal and state constitutions. *In re S.L.D.*, No. E2005-01330-COA-R3-PT, 2006 WL 1085545, *2 (Tenn. Ct. App. April 26, 2006) (citing *Troxel v. Granville*, 530 U.S. 57, 65, 120 S.Ct. 2054, 2059-60 (2000); *Hawk v. Hawk*, 855 S.W.2d 573, 578-79 (Tenn. 1993); *Ray v. Ray*, 83 S.W.3d 726, 731 (Tenn. Ct. App. 2001)). Parental rights are not, however, absolute. *State v. C.H.K.*, 154 S.W.3d 586, 589 (Tenn. Ct. App. 2004).

Termination proceedings are governed by statute. Tenn. Code Ann. § 36-1-113; *see Osborn v. Marr*, 127 S.W.3d 737, 739 (Tenn. 2004). Termination of parental rights must be based upon a finding by the court that (1) a ground for termination has been established, Tenn. Code Ann. § 36-1-113(c)(1); *In re D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003); *Jones*, 92 S.W.3d at 838; and (2) termination of the parent's rights is in the child's best interests.⁶ Tenn. Code Ann. § 36-1-113(c)(2); *In re A.W.*, 114 S.W.3d at 545; *In re M.W.A., Jr.*, 980 S.W.2d at 622.

The Department has an affirmative duty to make "reasonable efforts" to preserve, repair, or restore parent-child relationships whenever reasonably possible." *In re C.M.M.*, 2004 WL 438326, at *6 (Tenn. Ct. App. Mar. 9, 2004). Reasonable efforts are statutorily defined as the "exercise of reasonable care and diligence by the department to provide services related to meeting the needs of the child and the family." Tenn. Code Ann. § 37-1-166(g)(1).⁷

⁶The requisite proof must meet one of the higher evidentiary standards, that of clear and convincing evidence. *In re M.W.A., Jr.*, 980 S.W.2d at 622; *State Dep't of Children's Servs. v. Demarr*, No. M2002-02603-COA-R3-JV, 2003 WL 21946726, at *9 (Tenn.Ct. App. Aug. 13, 2003).

⁷In cases like this one, the factors that courts use to determine reasonableness include: (1) the reasons for separating the parents from their children, (2) the parents' physical and mental abilities, (3) the resources available to
(continued...)

The affirmative duty to make reasonable efforts, however, is not solely on the Department. The duty to make reasonable efforts is “a two-way street.” *State Dep’t. of Children’s Servs v. S.M.D.*, 200 S.W.3d 184, 198 (Tenn. Ct. App. 2006) perm. app. denied (Tenn. July 24, 2006). Thus, the parent has a corresponding duty to communicate with the Department and to actively cooperate in those efforts. *Id.*

The Department’s initial efforts were reasonably directed toward remedying the conditions that led to the child’s removal from the mother in order to assist her to attain the goals set forth in the permanency plan. As the record reveals, the Department scheduled appointments at Centerstone for the mother to have the psychological evaluation, it arranged funding for therapeutic visitation, and then engaged Kids First for therapeutic visitation. Moreover, Kids First provided transportation so the child could visit with his mother. The Department’s efforts after a few months were sporadic, at best, and the record fails to establish by clear and convincing evidence that they were reasonable; however, the mother’s actions and inactions are at the root of the decline in the Department’s efforts.

The mother’s relevant actions and inactions pertain to her failure to provide the Department with her contact information, which was exacerbated by the numerous relocations of her residence, eight in all during the relevant time period. This failure to cooperate with the Department’s attempts to make reasonable efforts is evident from her testimony at trial. After being questioned by counsel for the Department regarding her initial visits with her child, which the mother described as being “really helpful,” she went on to state:

Q: [Mother], if you found it helpful – – and I’ll characterize it and say that you were enjoying that process, what happened in March, why did the visits end then?

A: That’s when I had – – March of ‘05?

Q: It . . . might have been April.

A: April of ‘05 I had moved out.

Q: You moved to a different address?

A: Yes, ma’am. Like I said, I was house-hopping.

Q: Okay. Were you living at the Poston address with friends?

A: I was living at the Poston address with my ex-boyfriend.

. . .

Q: And then you left in April of ‘05, and moved, as you said house-hopping, went somewhere else?

A: And then somewhere else.

Q: And where did you land?

A: Evidently, I ended back at 31-C. The last spot I ended up at was 3-A Farris Drive.

⁷(...continued)

the parents, (4) the parents’ efforts to remedy the conditions that required the removal of the children, (5) the resources available to the Department, (6) the duration and extent of the parents’ efforts to address the problems that caused the children’s removal, and (7) the closeness of the fit between the conditions that led to the initial removal of the children, the requirements of the permanency plan, and the Department’s efforts. *In re Tiffany B.*, 228 S.W.3d 148, 158-59 (Tenn. Ct. App. 2007) (footnote omitted) (citing *In re Giorgianna H.*, 205 S.W.3d 508, 519 (Tenn. Ct. App. 2006)).

...

Q: And then also in March of 2005, correct me if I'm wrong, that's when you started back at Electro-Lux; is that correct?

A: Yes.

Q: April '05 you had another visit with Kids First at the Poston address?

A: Right.

Q: But after that you house-hopped somewhere else?

A: Yes, ma'am.

Q: Did you notify Kids First that your location had changed?

A: No, ma'am. Because at the apartment that I was at, they did not have a phone and, therefore, I was not able to make contact with no one.

Q: Well, let me ask, are there any pay phones available to you? Are there other places you could have made the call, perhaps from work?

A: I can't use the phone at work.

Q: Could you have stopped by the DCS office that we've already established was down the street from Electro-Lux to give the location of your new address?

A: Yes, ma'am.

A previous exchange between counsel for the Department and the mother explains the details of the close proximity of her work to the Department and her failure to go to the Department:

Q: And were you working at Electro-Lux?

A: Yes, ma'am.

Q: That's right down the street from the Department, is it not?

A: Yes, ma'am.

Q: Did you ever think about stopping by the office?

A: Yes, ma'am.

Q: And did you? Did you ever stop by the office at the Department of Children's Services?

A: No. No.

Later on in her testimony, Mother admitted that her shift at Electrolux was from 1:30 p.m. to 9:30 p.m., and thus she had ample time to walk to the Department's office during regular business hours to set up visits with her child. The record also contains an essentially incredible attempt by the mother to explain why she failed to set up visitation by telephone. The following are excerpts of the relevant testimony regarding her statement that she called the Department every day for two months or longer without ever speaking to anyone:

A: . . . I had tried to get in touch with [the case manager], but I kept getting the voice mail, and I didn't know who the current one was.

...

Q: When you didn't get any response – how many times did you try?

A: I tried every day before I went to work.

Q: Every day?

A: Before I went to work.

Q: For how many months?

A: Two, I think.

Q: You tried every day for two months before work. Did you ever dial out zero to get the operator, start asking more questions?

A: No.

Q: Did you ever ask to speak to a supervisor?

A: No.

...

Q: Is it fair to say that you were content leaving voice mail messages, if you did, but you took it no further than that?

A: Yes, ma'am.

Q: And were you working at Electro-Lux?

A: Yes, ma'am.

Q: That's right down the street from the Department, is it not?

A: Yes, ma'am.

It is undisputed that the mother failed to notify the Department of the address of any of her eight residences, or any phone number by which she could be contacted directly or indirectly. These failures by the mother significantly impaired the Department's ability to make reasonable efforts at reunification and constituted a failure on Mother's part to cooperate by making reasonable efforts of her own. As the foregoing testimony indicates, she did not provide an adequate reason for her failure to pursue the scheduling of visits with her child. Her primary excuse, which was unacceptable, was that she had other responsibilities and did not have enough time.

Assuming, *arguendo*, that the Department failed to keep in contact with Mother and to exert reasonable efforts, the Department's failures did not significantly interfere with Mother's ability to visit the child. To the contrary, there is no evidence in the record to suggest that anyone significantly interfered with her ability to visit her child. *See In re Adoption of Muir*, 2005 WL 3076896, at *4-5 (Tenn. Ct. App. Nov. 16, 2005); *see also Panter v. Ash*, 33 P.3d 1028, 1031 (Or. Ct. App. 2001) (holding that a parent's failure to visit is not excused by another person's conduct unless that person's conduct prevents the parent from performing her duty or amounts to a significant restraint of or interference with the parent's efforts). Although the communication problems between Mother and the Department presented obstacles, they did not excuse Mother from her duty to exert her own reasonable efforts.

The foregoing notwithstanding, Mother's abandonment of her child relieved the Department of its duty to make reasonable efforts to reunify her with the child. *See State Dept. of Children's Servs. v. D.D.T.*, 2006 WL 2135427, at *4 (Tenn. Ct. App. July 31, 2006); *see also In re Meagan*, 2006 WL 1473917, at *6 (Tenn. Ct. App. May 30, 2006). The record reveals that Mother willfully failed to visit or support the child during the four months prior to the filing of the petition, and she was not incarcerated or incapacitated during that period of time. In fact, she did not visit her child

at anytime during the eleven months prior to the filing of the petition in this matter. Moreover, she was employed by Electrolux in Springfield for a substantial portion of the time at issue, making approximately \$10 per hour, yet she failed to support the child during the four months prior to the filing of the petition. In fact, she did not make any payments of support for or on behalf of the child from the time the Department obtained custody of the child until the filing of the petition to terminate Mother's parental rights. Additionally and significantly, she knew the consequences of her failure to visit or to support the child because she signed the Department's Criteria & Procedures for Termination of Parental Rights on October 8, 2004. The foregoing facts clearly and convincingly support the trial court's conclusion that Mother abandoned her child by willfully failing to visit and willfully failing to support her child for the requisite period.

Having concluded the Department established a ground for termination, and realizing that only one ground need be established, *see* Tenn. Code Ann. § 36-1-113(c)(1); *In re D.L.B.*, 118 S.W.3d 360, 367 (Tenn. 2003); *Jones*, 92 S.W.3d at 838; we now consider whether the Department has established the second essential element, that being whether termination of the parent's rights is in the child's best interests. *See* Tenn. Code Ann. § 36-1-113(c)(2); *In re A.W.*, 114 S.W.3d at 545; *In re M.W.A., Jr.*, 980 S.W.2d at 622.

In determining whether termination of parental rights is in the best interest of the child, the court shall consider, but is not limited to, the following:

- (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
- (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
- (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
- (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
- (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
- (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;

(7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;

(8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or

(9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tenn. Code Ann. § 36-1-113(i). The foregoing list is not exhaustive, and the statute does not require every factor to appear before a court can find that termination is in a child's best interest. *See In re S.L.A.*, 223 S.W.3d at 301 (citing *State of TN Dept. of Children's Svcs. v. T.S.W.*, No. M2001-01735-COA-R3-CV, 2002 WL 970434, at *3 (Tenn. Ct. App. May 10, 2002); *In re I.C.G.*, No. E2006-00746-COA-R3-PT, 2006 WL 3077510, at *4 (Tenn. Ct. App. Oct. 31, 2006)).

The trial court found that termination of the mother's parental rights was in the best interest of the child for a number of reasons including the fact that the mother had "not made any adjustment of circumstances, conduct or conditions as to make it safe and in the child's best interest to return to her care," she continues to "be uncooperative with the Department," and she "did not visit the child at all for over a year, beginning April of 2005." The trial court also found that changing caregivers would likely have "a detrimental effect on him," due to the fact he has been cared for by the foster parents "very diligently for twenty five (25) months," and the child has bonded with the foster parents who wish to adopt him and "continue providing a safe, stable environment for him." These findings are fully supported by the record.

The child has been in a loving foster home with foster parents who have provided him with love and care for over half of his life. Moreover, the foster parents with whom he has lived since he was one month old desire to adopt the child. To further consider the possibility of returning the child to the mother in the unlikely event she could turn her life around, which could not be considered until dramatic changes occurred over a period of time, would only delay the inevitable and cause more lasting harm to the child. Having analyzed the child's best interests as viewed from the perspective of the child rather than the parent, see *White v. Moody*, 171 S.W.3d 187, 194 (Tenn. Ct. App. 2004), we have concluded that the record establishes by clear and convincing evidence that the termination of the mother's rights is in the best interest of the child.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against the Department of Children's Services.

FRANK G. CLEMENT, JR., JUDGE